

EXHIBIT A

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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHELLE ALBAHAE, et al,

) CASE NO. 2:23-cv-00982-RGK-PLA

19 || Plaintiffs,

Hon. R. Gary Klausner

20

**[PROPOSED] PLAINTIFFS' SUR-
REPLY IN OPPOSITION TO
OLAPLEX HOLDINGS, INC'S
MOTION TO DISMISS**

**22 OLAPLEX HOLDINGS, INC. AND
COSWAY CO., INC..**

Hearing Date: June 12, 2023
Hearing Time: 9:00 a.m.
Hearing Ctrm: 850; 8th Floor
Discovery Cut-Off: N/A
Scheduling Conference: May 22, 2023
Trial: N/A
Action Filed: February 9, 2023

Defendants.

1 Plaintiffs Michelle Albahae, Chelsea Aranjo, Megan Arcadi, Jessica Auriana,
 2 Juliette Ball, Chelsea Balmer, Rebecca Barnhouse, Tiffany Berry, Donna Bowen,
 3 Ashley Branning, Emma Broderick, Joanne Brown, Heather Burkett-Murphy, Holly
 4 Burkhardt, Hilary Cecile, Mackenzie Cogle, Ashley Courtney, Angelina da Gama,
 5 Sarah Dahan, Hope Daley-Derry, Robin Daniels, Roxanna De la Cruz, Katherine
 6 Donnelly, Brianda Earle, Monica Easily, Jacob Eisen, Michelle Estrada, Sandra
 7 Ferguson, Amanda Fontenot, Denisha Freeman, Heather Garon, Jennifer Georgeson,
 8 Alana Green, Nicole Hoff, Monica Hollifield individually and on behalf of S. H.,
 9 Lauren Hudson, Tiffany Huval, Aleha Ingle, Heather Jackson, Khila James, Kat
 10 Johnston, Jessica Jones individually and on behalf of P. J., Eunice Kahler, Tanya
 11 Karakasheva, Kathleen Keehner, Liza Krengel, Anna Kurilova, Julia Leon, Kristie
 12 Letizia, Tina Lewis, Laura Llewellyn, Stacey Lobdell, Llasmin Lozoya, Lyana
 13 Luciano, Kim Marietta, Theresa McCormack, Leslie McDonald, Lisa Mendez, Jill
 14 Mooshagian, Jennifer Morgan, Amanda Murphy, Jessica Nguyen, Leslie Orr,
 15 Heather Passmore, Sylva Pate, Sara Petty, Danielle Phelps, Erica Pilicy-Ryan, Robin
 16 Poston, Nicole Quenga, Melinda Quinn, Charity Reddish, Natalie Register, Jean
 17 Riccio, Sarah Richardson, Heather Rife, Alexa Roemer, Felicia Sanchez, Amy Shay,
 18 Farzana Siddiquei, Danielle Sigmon, Rhiannon Singer, Jodi Sobiech, Maria
 19 Sokolova, Debra Sterlacci, Miecha Isys Thomas, Vanessa Tocco, Noel Talerico,
 20 Marina Tolic, Leslie Tolstoy, Alexandra Urresti, Rebekah Valentine, Tanya Vallejo,
 21 Jerrika Vega, Christina Ventor, Robin Vogt, Terri Witts, Robin Yeager and Maureen
 22 Zavatone (collectively, “Plaintiffs”) file this Sur-Reply in Opposition to the Rule
 23 12(b)(6) Motion to Dismiss (the “Motion”) filed by Olaplex Holdings, Inc.
 24 (“Olaplex”) and respectfully state as follows:
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ARGUMENT AND AUTHORITIES

Without addressing its violation of the page limitation rules and its effort to squeeze arguments into footnotes, in its Reply in Support of its Motion to Dismiss (“Reply”), ECF 85, Olaplex wrongly contends Plaintiffs failed to address certain issues raised in the Motion to Dismiss, particularly Olaplex’s request (in a footnote) to dismiss Plaintiffs’ claim for punitive damages (Mem. in Support of Mot. to Dismiss, ECF 45, 24¹ n.38) and arguments asserted by Olaplex under the law of states other than California that Plaintiffs have failed to adequately plead a safer, alternative design (Mem. 46-47), that certain warranty, product liability and negligence claims are preempted by state product liability status or subsumed by other claims (Mem. 44, 47-48, 50-52), and that Plaintiffs may not assert standalone product liability, gross negligence or common law warranty claims (Mem. 44, 47-48). Reply 21-22. Olaplex incorrectly concludes that Plaintiffs have waived its opposition to these arguments. *Id.* (*citing Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009) (“Where plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived.”); *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal. 2013)).

However, Plaintiffs contest each of these issues and cited its reason for doing so in their Response. With regard to Olaplex's punitive damages argument, Plaintiffs allege that any challenge by Olaplex to this element of Plaintiffs' damages was a legal nullity because Olaplex failed to stay within the page limits of its Memorandum and, thus, its impermissible argument in only a textual footnote was without merit. Resp. 14 n.5. With regard to arguments made by Olaplex under

¹ Page citations are made to the ECF pagination found at the top right hand side of the filings.

1 the laws of any but California law, Plaintiffs point out what is indisputable: Olaplex
 2 wholly failed to establish that California law should be displaced, which is its
 3 burden as the party seeking to apply foreign law. Resp. 12-13 (citing *Holt v.*
 4 *Globalinx Pet, LLC*, 2013 WL 3947169, at *9 (C.D. Cal. July 30, 2013) (Carter, J.).
 5 Although Olaplex omits it from its papers, here again, Olaplex attempted to evade
 6 the page limits for its brief by incorporating by reference over fifteen pages of
 7 briefing and a chart from another filing, in its motion to sever. Mem. n.12) (citing
 8 ECF 72-1, 14-21 and Ex. A).

9 Where it is clear a party has not abandoned its claim, the Court should refrain
 10 from finding the issue waived and, should instead, conduct the same analysis to
 11 determine whether judgment is justified as a matter of law. *See Jones v. Wong*, No.
 12 215CV0734TLNACP, 2018 WL 2297056, at *7 (E.D. Cal. May 21, 2018), report
 13 and recommendation adopted, No. 2:15-CV-00734-TLN-AC, 2018 WL 4698316
 14 (E.D. Cal. Sept. 28, 2018). As noted in the *Jones* opinion, courts often evaluate the
 15 merits of an argument even when there is no discussion at all in opposition. *Id.* n. 6.
 16 Indeed, the *Jones* opinion cites the case on which Olaplex primarily relies as an
 17 example. *Id.* (noting *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211
 18 (N.D. Cal. 2009) holds “[w]here plaintiffs fail to provide a defense for a claim in
 19 opposition, the claim is deemed waived,” but “consider[s] the claim anyway”).

20 Plaintiffs stand firmly on their argument that Olaplex has failed to meet its
 21 burden to displace California law and, therefore, has failed to establish a right to
 22 judgment as a matter of law applying the law of other states.

23 Plaintiffs, likewise, contend that Olaplex failed to raise an argument that
 24 punitive damages was placed at issue merely by referencing the notion in an
 25 impemissble textual footnote. Nevertheless, in an abundance of caution, Plaintiffs
 26 address the merits of this argument.

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1 **I. Plaintiff Need Only Plead Allegations from Which the Court May Infer**
 2 **Olaplex Acted Willfully and With Conscious Disregard of Plaintiffs' Safety**

3 Under California law, punitive damages are available where the factfinder
 4 concludes any tortious conduct was committed with malice or by oppression or
 5 fraud. *Bose v. Wahl Clipper Corp.*, No. CV1106087MMMSHX, 2012 WL
 6 12861186, at *5 (C.D. Cal. Mar. 29, 2012). The standard applies to any tort,
 7 specifically product liability claims. *Id.* The standard is not incompatible with an
 8 unintentional tort as the term malice, for example, includes not just conduct
 9 committed with malicious intent, but also conduct showing conscious disregard of
 10 the probability that the conduct will result in injury to others. *Id.*

11 Under California punitive damages law, malice means, among other things,
 12 despicable conduct carried on by the defendant with a willful and conscious
 13 disregard of the rights and safety of others. Cal. Code Civ. Proc. § 3294(a).
 14 Similarly, oppression is defined as despicable conduct that subjects a person to cruel
 15 and unjust hardship in conscious disregard of that person's rights. *Id.* Fraud means
 16 an intention misrepresentation, deceit or concealment of material fact known to the
 17 defendant made with the intention of depriving a person of property or legal rights
 18 or otherwise causing injury. *Id.*

19 **II. Plaintiffs Have Plead Intentional and Wantonly Reckless Conduct That**
 20 **Olaplex Knew or Should Have Known Was Likely to Cause Severe Injury**
 21 **to Plaintiffs and Other Consumers**

22 Plaintiffs have plead many allegations supporting a finding of malice,
 23 oppression or fraud:

24 ○ The Products are defective as a result of the design. FAC ¶ 267.
 25 Olaplex designs and markets the Products. FAC ¶ 266. The design is
 26 dangerous in its use of ingredients known to be irritants, sensitizers and
 27 carcinogens. FAC ¶¶ 119-120, 124. Olaplex used the irritants,

sensitizers and carcinogens despite safer alternatives in order to maximize profits and to the detriment of consumers. FAC ¶ 267.

- The Products are defective due to inadequate and unsafe warning, including the (1) failure to warn and even concealment of Olaplex's use of known irritants, sensitizers and carcinogens, and (2) instructions to use the Products to the exclusion of other brands and for long or indefinite periods of time. FAC ¶ 268.
- The Products are defective due to inadequate testing and study and/or the failure to act on or report the results of such tests and studies. FAC ¶ 269. Olaplex intentionally failed to perform research or testing consistent with applicable industry and scientific standards before placing the Products on the market. FAC ¶ 260. T
- Olaplex knew, or in the exercise of reasonable care should have known, that the Products present an unacceptable risk to consumers, and would result in damages that were foreseeable and reasonably avoidable. FAC ¶ 262.

In each instance where Olaplex's conduct fell below the applicable standard of care, its conduct was intentional and undertaken with knowledge that its acts or omissions were reckless and likely to lead to serious and long lasting injury to consumers. FAC ¶ 263.

III. Any Doubt as To Whether Plaintiffs' Pleadings Are Sufficient Should be Resolved in Favor of Plaintiffs

Again, at the motion to dismiss stage, Plaintiffs are given the benefit of doubt for every factual allegations as well as every reasonable inference to be drawn from the allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955 (2007)). The pleading standard is further relaxed when it comes to matters particularly within the opposing party's knowledge, such that a plaintiff cannot be expected to have

1 personal knowledge. *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993); *see*
2 *also TRC & Assocs.*, 2013 U.S. Dist. LEXIS 163903, at *17-21. That is true even
3 when Rule 9(b) would otherwise apply. *Id.*

4 Intent, awareness and attitude are states of mind known particularly by
5 Olaplex at this stage in the litigation. Thus, any doubt as to whether Plaintiffs'
6 pleadings are sufficient should be resolved in favor of Plaintiffs. *See Neubronner*, 6
7 F.3d at 672.

8 **CONCLUSION AND PRAYER**

9 For these reasons, Plaintiffs respectfully request the Court deny Olaplex's
10 Motion to Dismiss and for such other and further relief to which they may be
11 entitled.

12 Dated: June ___, 2023
13

14 Respectfully submitted,

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27 **CERTIFICATE OF SERVICE**
28

19 I certify that on the ____ day of ____ 2023, I served the foregoing document
20 on all counsel of record via ECF.
21

22 By: /s/ Amy E. Davis
23

24 **CERTIFICATE OF COMPLIANCE**
25

26 The undersigned, counsel of record for Plaintiffs, certifies that this brief
27 contains _____ words and ____ pages, which complies with the word limit of L.R.
28 11-6.1 and the page limit set by the Honorable R. Gary Klausner's Standing Order.
29

30 By: /s/ Amy E. Davis
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